



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC NO. 96 Of 2016

EWM (Suing as the Guardian of NMT).....PLAINTIFF

VERSUS

BNN.....1ST DEFENDANT

DANIEL NGUMBU MBATIA.....2ND DEFENDANT

CATHERINE WANJERI MACHARIA.....3RD DEFENDANT

JUDGMENT

1. NMT (hereinafter “N”) commenced proceedings in this matter on 22nd March 2016 when he filed plaint dated the same date. The 1st defendant is his wife. As fate would have it, he later developed health complications leading, among others, to loss of memory. Consequently, his daughter EWM was appointed his guardian under the Mental Health Act, pursuant to orders made on 20th May 2019 in Nakuru HC Petition No. 6 of 2018. Subsequently, the guardian filed an amended plaint to reflect the guardianship. All other aspects of the original plaint were retained.

2. It was averred in the amended plaint that prior to the year 2006, N was the registered owner of the parcel of land known as Dundori Lanet Block [...] Nyonjoro. That he fell ill in the year 2006 and subdivided the parcel into two portions: Dundori Lanet Block [...] (Nyonjoro) which he registered in his name and Dundori Lanet Block [...] (Nyonjoro) which he registered in the name of the 1st defendant to hold in trust for herself, her children and the children of DWN, his deceased first wife. That he further subdivided Dundori Lanet Block [...] (Nyonjoro) and sold some portions thereof to take care of his medical bills.

3. It was further averred that the 1st defendant breached the trust by subdividing Dundori Lanet Block [...] (Nyonjoro) into two parcels namely Dundori Lanet Block [...] (Nyonjoro) which she sold to the 2nd and 3rd defendants and Dundori Lanet Block [...] (Nyonjoro) which she retained in her name. N stated that the subdivisions and transfers by the 1st defendant were also fraudulent. He therefore prayed for judgment against the defendants for:

(a) An order of injunction restraining the 1st defendant from alienating, subdividing or disposing off LR Dundori Lanet Block [...] (Nyonjoro).

(b) An order of injunction restraining the 2nd & 3rd defendants from alienating, subdividing or disposing off LR Dundori Lanet Block [...] (Nyonjoro).

(c) A declaration that the 1st defendant holds LR No. Dundori/Lanet Block [...] (Nyonjoro) in trust for herself, the plaintiff and all the children of the 1st and 2nd house.

(d) An order for cancellation of titles LR Dundori Lanet Block [...] (Nyonjoro) & LR Dundori Lanet Block [...] (Nyonjoro) and rectification of land register to reflect the cancelation and restoration by the Land Registrar.

(e) That after (d) above the defendant do transfer the land LR Dundori Lanet Block [...] (Nyonjoro) to the plaintiff for further subdivision to all his children in the alternative

(f) That the executive officer Nakuru Law courts do sign the necessary transfer documents and the consents of the Land Board in the plaintiff's name.

(g) Costs of the suit.

4. The 1st defendant filed a defence in which she admitted that N was the registered owner of Dundori Lanet Block [...] (Nyonjoro) and that it was subdivided into the portions stated by N. She denied N's allegations of illness and trust. She added that the creation and registration of Dundori Lanet Block [...] (Nyonjoro) in her name was so that she could hold it in trust for herself and her 5 children. She further stated that the subdivision and transfer of portions of Dundori Lanet Block [...] (Nyonjoro) was lawfully done. She urged the court to dismiss the suit with costs.
5. The 2nd and 3rd defendants filed a statement of defence in which they denied the allegations of breach of trust and fraud. They added that they lawfully acquired Dundori Lanet Block [...] (Nyonjoro) as innocent purchasers. They equally urged the court to dismiss the suit with costs.
6. Seeing that the dispute is between close family members, the court urged the parties to explore amicable settlement and gave them several opportunities to do so. Since no settlement was forthcoming despite the efforts, the matter proceeded to hearing.
7. EWM testified as the sole witness in N's case. She stated that N owned the parcel of land known as Dundori Lanet Block [...] (Nyonjoro) and that when he became unwell, he subdivided the plot into two and transferred one of the new plots to the 1st defendant herein so that she could later transfer it to his children if he passed away. That when N became well and demanded the plot back, the 1st defendant refused to transfer it back to him. That N transferred Dundori Lanet Block [...] (Nyonjoro) to the 1st defendant while he retained Dundori Lanet Block [...] (Nyonjoro) in his name.
8. Ms M further testified that her father (N) had two wives – the late DWN who was her mother and the 1st defendant. That the 1st defendant was told to hold the plot on behalf of everybody including Ms M's mother's house which has now been left without any plot. She added that N was not aware that the 1st defendant subdivided and sold part of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendant. That N later subdivided plot Dundori Lanet Block [...] (Nyonjoro) into 3 portions which he sold with the result that he only remained with a small portion measuring 50 by 100.
9. The plaintiff's case was then closed.
10. BNN, the 1st defendant, opened the defence case as DW1. She stated that N is her husband and that he subdivided his original plot Dundori Lanet Block [...] (Nyonjoro) into 3 new parcels: Dundori Lanet Block [...] (Nyonjoro), Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro). That N transferred Dundori Lanet Block [...] (Nyonjoro) to her while retaining Dundori Lanet Block [...] (Nyonjoro) in his name. He sold Dundori Lanet Block [...] (Nyonjoro).
11. The 1st defendant further testified that prior to transferring the plot to her N held a session with elders in her house and informed them of his intentions. That he was not sick at all at that time and was working as a carpenter. That N and her were living peacefully at the time and problems arose when the children of the first wife, all of whom are married, raised objections. She added that N and the children sold all the remaining plots including the one where his first wife is buried. That N obtained consent of the land control board to subdivide Dundori Lanet Block [...] (Nyonjoro) and to transfer Dundori Lanet Block [...] (Nyonjoro) to her. That he even engaged a surveyor to undertake the subdivision. She added that she subdivided Dundori Lanet Block [...] (Nyonjoro) and sold a portion to the 2nd and 3rd defendants while retaining another. That the 2nd and 3rd defendants paid her the full purchase price and that the transaction was approved by the Land Control Board without any objection.
12. She testified further that N had another wife who was the first wife with whom they all lived on Dundori Lanet Block [...] (Nyonjoro). That the first wife left to be married elsewhere but later returned and reconciled with N. That N gave the first wife and her children 1 acre and since they did not live on it due to her children being married and the first wife having remarried elsewhere.
13. Next was Moses Ware Malit who testified as DW2. He stated that he is a Survey Assistant Grade 3 and that he obtained a Diploma in Land Survey from Kenya Polytechnic. He added that he met N in the year 2005 when N was on the rooftop dismantling the roof at a client's home around Pipeline area. That upon N learning that he was a surveyor, N asked him to do for him some survey work in Lanet. That he went to N's homestead the next day and N instructed him to subdivide Dundori Lanet Block [...] (Nyonjoro) into 3 portions. He did the subdivision by preparing a mutation which he presented to the Survey of Kenya. The resultant subdivisions were Dundori Lanet Block [...] (Nyonjoro) measuring 0.25 acres, Dundori Lanet Block [...] (Nyonjoro) measuring one acre and lastly Dundori Lanet Block [...] (Nyonjoro) measuring 2.5 acres.
14. Mr Malit further testified that upon N's instructions he transferred Dundori Lanet Block [...] (Nyonjoro) to Mr. John Auta, Dundori Lanet Block [...] (Nyonjoro) to the first defendant and retained Dundori Lanet Block [...] (Nyonjoro) in his N's name. That as he did the work, he did not notice any sickness on N's part and that N personally went to obtain consent of the Land Control Board.
15. DW3 was Joseph Mwangi. He stated that he is N's neighbour and that his home is 200 metres from N's. That in the year 2005, he and about 9 other elders were summoned by N to his home. That N told them that he wanted to subdivide his plot because he went to look for his first wife and found her at Nyahururu, married to another man. That N showed them how he wanted to subdivide the plot and that a surveyor came later to complete the survey. He added that when N summoned the elders, he did not have any health problem and that after the meeting with the elders, N continued working as a builder until the year 2012. He further stated that N's first wife had six daughters who were all adults and married as at the time of the subdivision.
16. The 1st defendant's case was closed at that point.
17. Last on the witness stand was Daniel Ngumbu Mbatia, the 2nd defendant, who testified as DW4 in support of his joint case with the 3rd defendant. He stated that in January 2012, while he and the 3rd defendant were looking for property to purchase, he learnt that the 1st

defendant wanted to sell a portion of her parcel known as Dundori/Lanet Block [...] (Nyonjoro). That after conducting a search on 5th April 2012 which confirmed that the 1st defendant was the owner and that there was no caution, they executed a sale agreement on 22nd June 2012 pursuant to which they purchased 0.25 acres of the plot at a purchase price was KShs 960,000 which they paid in full. Subsequently, they were issued with title number Dundori/Lanet Block [...] (Nyonjoro) in their joint names. Mr Mbatia further testified that the subdivision process was carried out by the 1st defendant who was the registered owner and that their intention when purchasing the property was to develop a home on it, plan which was halted by this case.

18. The 2nd and 3rd defendants' case was thereby closed.

19. Parties then filed and exchanged written submissions. It was argued on behalf of the plaintiff that the registration of the 1st defendant as the proprietor of Dundori Lanet Block [...] (Nyonjoro) was subject to N's overriding interest in terms of **Section 28 of the Land Registration Act, 2012**. That the registration was effected without any spousal consent from N and that transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants was equally devoid of N's spousal consent. That Dundori Lanet Block [...] (Nyonjoro) was matrimonial property as defined at **Section 2 of the Matrimonial Property Act, 2013** and that the 1st defendant held it in trust for N and their children.

20. Relying on **Section 3 (2) of the Judicature Act**, it was argued that Kikuyu Customary Law applies to N and the 1st defendant and that the said customary law has a concept 'holding in trust' popularly referred to as 'Muramati' which in essence means the property is held in trust for the benefit of the rest of the family members. Reliance was placed on the case of **Henry Mukora Mwangi v Charles Gichina Mwangi Civil Appeal No. 245 of 2004 [2013] eKLR**.

21. It was further argued on behalf of N that the 1st defendant committed fraud by subdividing Dundori Lanet Block [...] (Nyonjoro) and transferring Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants without N's knowledge and consent. Additionally, it was contended that the 2nd and 3rd defendants did not conduct any due diligence beyond obtaining a certificate of search and that they were therefore not innocent purchasers. N therefore asked the court to grant him judgment with costs.

22. For the 1st defendant, it was argued that N voluntarily undertook the subdivision of Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to her while in good health and without any intention that she holds it in trust. It was contended that if N wanted the 1st defendant to hold the land in trust, he would have transferred the whole of Dundori Lanet Block [...] (Nyonjoro) to her. It was further argued that N retained Dundori Lanet Block [...] (Nyonjoro) in his name and subdivided it and sold several portions of it without any allegations of trust. That it would be absurd and patriarchal to now claim trust as regards the 1st defendant's portion. Additionally, it was argued that there was no factual basis upon which to infer any trust. Reliance was placed on the case of **MURIUKI MARIGI vs RICHARD MARIGI MURIUKI & 2 OTHERS [1997] eKLR**.

23. It was further argued on behalf of the 1st defendant that having been issued with title in respect of Dundori Lanet Block [...] (Nyonjoro), she became the absolute owner thereof. Reliance was placed on the case of **Emmanuel Ngala Anzaya v Elkana Epiche Aura [2020] eKLR**. It was also argued that N did not prove fraud and that he neither pleaded the issue of spousal consent nor raised it in evidence. The court was urged to dismiss N's case with costs.

24. On the part of the 2nd and 3rd defendants, it was argued that trust is a question of fact that must be proved by whoever is alleging it and that N had failed to establish any trust. That by virtue of her registration, the 1st defendant was the absolute proprietor of Dundori Lanet Block [...] (Nyonjoro). Reliance was placed on the cases of **Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR** and **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR**.

25. It was further argued for the 2nd and 3rd defendants that the 1st defendant as an absolute proprietor sold to them the portion of Dundori Lanet Block [...] (Nyonjoro) comprised in Dundori Lanet Block [...] (Nyonjoro) which they acquired as bona fide purchasers for value. The case of **LAWRENCE P. MUKIRI V ATTORNEY GENERAL & 4 OTHERS [2013] eKLR** was cited. They therefore urged the court to dismiss N's case with costs.

26. I have considered the parties' respective pleadings, evidence and submissions. The issues that arise for determination are whether the 1st defendant held Dundori Lanet Block [...] (Nyonjoro) in trust; whether the subdivision of Dundori Lanet Block [...] (Nyonjoro) into Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants were fraudulent; whether spousal consent was necessary in respect of subdivision of Dundori Lanet Block [...] (Nyonjoro) into Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants and lastly; whether the reliefs sought should issue.

27. Did the 1st defendant hold Dundori Lanet Block [...] (Nyonjoro) in trust? I am afraid N has failed to persuade me so. Existence of trust is a question of fact which must be proven through evidence. In **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, the Supreme Court stated as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land

2. *The claimant belongs to such family, clan, or group*

3. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*

4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*

5. *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

28. In this case, N was the registered proprietor of Dundori Lanet Block [...] (Nyonjoro). He lived on the said property with the 1st defendant herein who is his wife. Evidence on record shows that in the year 2006 he subdivided the parcel into three portions: Dundori Lanet Block [...] (Nyonjoro) which he sold to Mr John Auta, Dundori Lanet Block [...] (Nyonjoro) which he registered in his name and Dundori Lanet Block [...] (Nyonjoro) which he registered in the name of the 1st defendant.

29. This suit was filed on 22nd March 2016, about 10 years after the subdivisions and transfers. N did not testify at the trial. His daughter Elizabeth Wangari Muthonjia who testified on his behalf stated that she was not present when N subdivided Dundori Lanet Block [...] (Nyonjoro). Her claims that the 1st defendant “was told” to hold Dundori Lanet Block [...] (Nyonjoro) for everybody are thus hearsay and are unsupported by any other evidence. On the contrary, there was clear evidence from DW1, DW2 and DW3 that N effected the subdivision and transfer willingly and unconditionally while in a good state of health.

30. Was the subdivision of Dundori Lanet Block [...] (Nyonjoro) into Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants fraudulent? Fraud is a serious allegation which must be proven on a standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt.

31. The 1st defendant is now the registered proprietor of Dundori Lanet Block [...] (Nyonjoro) while the 2nd and 3rd defendants are the registered proprietors of Dundori Lanet Block [...] (Nyonjoro). Under **Section 26 (1) (a)** of the **Land Registration Act**, any person seeking to defeat the titles on allegations of fraud must show that they were party to such fraud.

32. The Court of Appeal stated in **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR** as follows:

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...

33. Besides alleging fraud, N did absolutely nothing to prove his allegations either at all or to the required standard. It is not enough to just plead fraud. The facts showing fraud must be laid out clearly in evidence. I am not persuaded that the subdivision of Dundori Lanet Block [...] (Nyonjoro) into Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants were fraudulent.

34. Was spousal consent necessary in respect of subdivision of Dundori Lanet Block [...] (Nyonjoro) into Dundori Lanet Block [...] (Nyonjoro) and Dundori Lanet Block [...] (Nyonjoro) and transfer of Dundori Lanet Block [...] (Nyonjoro) to the 2nd and 3rd defendants? As correctly submitted by counsel for the 2nd and 3rd defendants, N did not plead the issue of spousal consent. Suffice it to restate that parties are bound by their pleadings and that the court may not pronounce itself on a matter not pleaded. See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**. It follows therefore that the argument that spousal consent was necessary in the circumstances and that it was not obtained, which is raised in the submissions without any foundation in N’s pleadings, is not worthy of any consideration.

35. In view of the foregoing discourse, N’s case is devoid of merit. He has not made a case for the reliefs sought. I therefore dismiss the case.

36. In view of the close family relationship between the plaintiff and the 1st defendant, I order that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF JUNE 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Nancy Njoroge for the plaintiff

Mr Ndubi for the 1st defendant

Mr Mukira for the 2nd and 3rd defendants

Court Assistants: B. Jelimo & J. Lotkomoi